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No. 00-556

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KARLA PIERCE, Secretary, Kansas Department of Revenue,

Petitioner,

v.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' ruling that the Eleventh Amendment does not bar a challenge by the Respondent Indian Tribes to a State of Kansas motor fuel tax is consistent with this Court's precedents?

2. Whether the Court of Appeals' ruling that the Respondent Indian Tribes had standing to challenge a State of Kansas motor fuel tax as applied to Tribal businesses on Tribal lands conflicts with the Supreme Court of Montana's decision in *Carter v. Montana Dept. of Revenue*, 274 Mont. 33, 905 P.2d 1102 (1995)?

3. Whether this Court should review the applicability of *Ex parte Young*, 209 U.S. 123 (1908), to the facts of this case when the Court of Appeals neither reached nor addressed that issue?

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STATEMENT OF THE CASE

Each Respondent Tribe (Sac and Fox Nation of Missouri ("Sac and Fox"), Iowa Tribe of Kansas and Nebraska ("Iowa"), and Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo")) is a federally-recognized American Indian Tribe maintaining government-to-government relations with the United States and having governing bodies duly recognized by the Secretary of the Interior. The Tribes are the beneficial owners of, and exercise jurisdiction over, Indian Reservations and trust lands located in Kansas.

Each of the three Respondent Tribes owns and operates gas stations on its respective Indian lands within the State of Kansas. Each Tribe's retail fuel sales are subject to Tribal taxes from which the Tribes earn significant revenues. The revenues from retail fuel sales are used by each Tribe for provision of governmental and social services to its members, including public safety.

The Secretary for the Kansas Department of Revenue ("Revenue Secretary") attempted to apply a Kansas motor fuel tax on the distribution of fuel to these Tribal retailers. The Tribes sued the Revenue Secretary (not the State of Kansas) to enjoin collection of the tax. The United States District Court for the District of Kansas permanently enjoined the Revenue Secretary from enforcing or collecting the State tax as against distributors who sell to the Tribes. The Court of Appeals reversed on grounds not challenged here and remanded. In so doing, the Court of Appeals ruled, based on this Court's precedents, that the Eleventh Amendment did not bar the suit and that the Tribes had standing to challenge the tax. The Revenue Secretary seeks a writ of certiorari to contest these two rulings.

REASONS FOR DENYING THE PETITION

The Revenue Secretary has set forth no compelling reason to grant the petition. The Court of Appeals' rejection of the Eleventh Amendment immunity and standing defenses does not conflict with the relevant decisions of this Court or with a decision by a State court of last resort. This Court has consistently upheld a Tribe's right to seek prospective injunctive relief in federal court from State taxation. There is no need or reason to revisit this issue or depart from this unbroken line of precedent. The Court should deny the petition.

I. THIS COURT SHOULD DENY THE PETITION BECAUSE NO CONFLICT EXISTS BETWEEN THIS COURT'S DECISIONS AND THE COURT OF APPEALS' REJECTION OF THE ELEVENTH AMENDMENT IMMUNITY DEFENSE

A. This Court Has Consistently Permitted Tribes To Sue States To Enjoin Application Of State Taxes To Tribes And Tribal Activities

There is a strong presumption against State taxation of Indian Tribes and Tribal activities on Tribal lands. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (presumption against State taxing authority in Indian country absent Tribal consent or explicit congressional authorization); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("Indian immunity from state taxation is very strong and . . . state interest in taxation is correspondingly weak"). When States attempt to tax Tribal activities on Tribal lands, "there is a long tradition of federal courts exercising jurisdiction over tribal challenges to state taxation." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1049 (9th Cir. 2000).

Citing this Court's precedents in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court of Appeals ruled that the District Court had jurisdiction to reach the merits of the lawsuit notwithstanding the Eleventh Amendment immunity raised by the Revenue Secretary. The Revenue Secretary argues that the Court of Appeals "seriously misread" these decisions and now opens the floodgate for lawsuits by Tribes seeking "all sorts of tax-related claims for money directly against States in federal court." (*See* Petition at 8-9).

The Revenue Secretary has mischaracterized the holding, which concerned only prospective injunctive relief, not money damages. The Tribes did not argue, and the Court of Appeals neither addressed nor ruled, that Tribes may sue States for money damages on tax-related claims. Rather, as this Court has consistently held, Tribes may sue to prospectively enjoin application of State taxes to Indian Tribes.

In 1832, Chief Justice Marshall first articulated the fundamental limitation on State interference with Tribal affairs: "The whole intercourse between the United States and this [Cherokee] nation, is, by our Constitution and laws, vested in the government of the United States." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). This Court later noted that the "rationale of the [*Worcester*] case plainly extended to state taxation within the reservation." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (State individual income tax invalid as applied to Reservation Indians).

Since *Worcester*, this Court many times has adjudicated suits by Indian Tribes and others challenging State taxation of Tribal activities within Indian country.[1] The most recent such adjudication is found in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), in which the Tribe sued the State tax collection agency. This Court proscribed application to Indian lands of a State fuel tax law closely

1. *See, e.g., The Kansas Indians*, 5 Wall. 737 (1867) (State cannot impose land tax on Reservation Indians); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (State cannot tax revenues of trader doing business with Tribe); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (State individual income tax invalid as applied to Reservation Indians); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (tax on Indian-owned personal property situated in Indian country unenforceable); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (State sales tax not enforceable as to on-reservation smoke shop sales to tribal members); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (federal law preempted application of State motor carrier fuel tax on tribal land); *Washington v. Confederated Tribes of Colville Indian reservation*, 447 U.S. 134 (1980) (State tax may be enforceable if legal incidence falls on non-Indians and balance of interests favors State); *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (federal law preempts State gross receipts tax based on Indian Commerce Clause and sovereign status of Tribes); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991) (State may tax cigarette sales to non-members of Tribe); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992) (County may impose ad valorem tax on reservation fee lands, but not an excise tax on sales of such lands); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (Presumption that State does not have jurisdiction to tax income of tribal members who live and work on the reservation); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994) (reasonable State tax regulations on cigarette sales to non-members valid).

resembling the Kansas fuel tax at issue here. The Court in *Chickasaw* reiterated the settled "rule that Indians and Indian tribes are generally immune from state taxation" within Indian country. 515 U.S. at 464. In none of the dozens of Indian tax cases has this Court or any other federal court indicated that the Eleventh Amendment bars such suits against the States, State agencies, or State officials. Had it been otherwise, *Chickasaw* would not have been decided the way it was.

Specifically, in *Moe* this Court stated that "Congress contemplated that a tribe's access to federal court to litigate a matter arising under the Constitution, laws, or treaties would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473. As this Court subsequently noted, "[t]he 'respect' at issue in *Moe* was access to federal court for the purpose of obtaining injunctive relief from state taxation." *Blatchford*, 501 U.S. at 784. That is all that the Tribes have sought here: Injunctive relief from State taxation. The Court of Appeals correctly relied on *Moe* and *Blatchford*. (*See* Petition at 10a).

Contrary to the Revenue Secretary's suggestion, *Blatchford* did not analyze, let alone preclude, injunctive relief for a Tribe from State taxation despite the Eleventh Amendment. *Blatchford* concerned a claim for money damages, not a request to prospectively enjoin a State tax. The Revenue Secretary would bootstrap dicta in footnote three regarding Eleventh Amendment immunity into a dispositive ruling of the Court. Rather, the Court expressly declined to address whether the Eleventh Amendment would bar such a claim. *See Blatchford*, 501 U.S. at 775.

The Court of Appeals properly found that it had jurisdiction to reach the merits notwithstanding the Eleventh Amendment. No other federal court has held otherwise. The Revenue Secretary is essentially asking this Court to review and reverse settled precedent dating back over a century permitting Tribes to sue States in federal court to enjoin State taxation. Because the Court of Appeals' ruling is fully consistent with this Court's precedents, this Court should deny the petition.

B. This Court Has Repeatedly Reaffirmed The Right To Sue A State Under *Ex Parte Young*

The Court of Appeals' decision upholding jurisdiction was correct regardless of the Eleventh Amendment. Wholly apart from the long line of Indian tax precedents cited above, the District Court had jurisdiction under the theory of *Ex parte Young*, 209 U.S. 123 (1908). The Tribes sued the Revenue Secretary, not the State. Under *Ex parte Young*, the Tribes thereby avoided any bar of State immunity.

The Court of Appeals did not reach this issue, and it is not properly before this Court. Respondents address it here only because it is raised in the petition.

It is hornbook law that the Eleventh Amendment is not a bar to suit against a State official allegedly acting in excess of his authority. *See Ex parte Young*, 209 U.S. at 123. In *Ex parte Young*, this Court held that injunctive relief may be obtained against a State, notwithstanding the Eleventh Amendment, so long as the action is against the State official who allegedly is acting in violation of federal law. 209 U.S. at 159-60; *see also Quern v. Jordan*, 440 U.S. 332, 337 (1979) ("a federal court, consistent with the Eleventh

Amendment, may enjoin State officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the State treasury"). There is no question but that Indian Tribes may bring actions for declaratory and injunctive relief based on *Ex parte Young*. *E.g. Native Village of Venetie v. State of Alaska*, 944 F.2d 548, 552 (9th Cir. 1991), *subsequent opinion rev'd on other grounds*, 522 U.S. 520.

In *Florida v. Seminole Tribe of Florida*, 517 U.S. 44 (1996), this Court reaffirmed the validity of *Ex parte Young*. In ruling that Congress did not constitutionally grant Indian tribes the right to sue States for prospective injunctive relief to enforce the Indian Gaming Regulatory Act ("IGRA"), the Court carefully distinguished *Ex parte Young*. Justice Scalia, writing for the majority and responding to the dissent, affirmed that injunctive relief under *Ex parte Young* remains available "to remedy a state officer's ongoing violation of federal law." *Id.* at n.16 (emphasis added); *see also id.* at n.14.

In *Alden v. Maine*, 527 U.S. 706 (1999), the Court was careful to emphasize the historical need for the *Ex parte Young* exception. The Court specified that the Eleventh Amendment "does not bar certain actions against state officers for injunctive or declaratory relief" under *Ex parte Young*. Justice Breyer made the same observation in his dissent in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

Despite the clear applicability of *Ex parte Young*, the Revenue Secretary cites *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to seek to limit a Tribe's access to court to challenge a State tax. As the

Revenue Secretary has earlier conceded, though, *Seminole* hinged on the authority of Congress to abrogate State sovereign immunity by authorizing Indian Tribes to sue States to enforce Tribal *statutory* rights under the detailed provisions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710, *et seq.* This Court concluded that Congress had no such power under the Indian Commerce Clause.

Seminole Tribe did not involve, and this Court had no reason to address, the reverse situation here, in which *a State attempts to assert jurisdiction over an Indian Tribe* and Indian commerce, contrary to settled *constitutional and common law*. This is the situation in most of the above-cited Indian tax cases as well. *Seminole Tribe* simply is inapposite to the Revenue Secretary's attempt to impose the Kansas Motor Fuel Tax on retail fuel sales by Indian Tribes on their Tribal lands located within the State.

Whether Congress has the power under the Indian Commerce Clause to enact a statute that abrogates a State's immunity is an entirely different question than whether the Indian Commerce Clause and federal common law, by their own terms and without any intervention of Congress, prohibit a State from asserting tax jurisdiction over an Indian nation in the first instance. It is the latter question that this Court in *Seminole* had no occasion to address — and that the Court already has answered in more than one hundred years of Indian tax cases.

The Revenue Secretary wholly ignores the *Chickasaw* Indian fuel tax case and its predecessor Indian tax cases. The Revenue Secretary dares not state, but necessarily implies, that this Court in *Seminole* overruled its year-old

Chickasaw decision and other Indian tax precedents (and did so without mentioning any of them, their subject matter, or their jurisdictional context). This implication is frivolous.

The Revenue Secretary's reliance on *Coeur d'Alene* also is unavailing. *Coeur d'Alene* supports the conclusion that *Ex parte Young* authorizes this suit. A seven member majority agreed that federal district courts have jurisdiction over an action against State officials under *Ex parte Young* where (1) the plaintiff alleges an ongoing violation of federal law, and (2) the relief sought is prospective only. 521 U.S. at 294. Due to the unique submerged-lands context of the *Coeur d'Alene* case, which is not present here, the Court found a narrow exception to *Ex parte Young*. Although the allegations of the complaint did not bring the case within the *Ex parte Young* doctrine "under these particular and special circumstances," the Court reaffirmed the vitality of *Ex parte Young* as applicable here.

The facts here could not be less similar than those of *Coeur d'Alene*. This is not a quiet title action or its functional equivalent; this suit does not in any manner implicate the State's interest in control of submerged lands, navigable waters, or any other realty; and this suit involves no State constitutional interest. The State has never had any constitutional right or cognizable interest in taxing Indian Tribes.

The present suit thus falls squarely within the *Ex parte Young* exception as amplified by *Coeur d'Alene*. The complaint alleged violations of federal law by the defendant, namely the unlawful imposition of the State motor fuel tax. Further, the complaint sought prospective equitable relief only; no award of damages was sought. This case did

not raise the specter of unwarranted intrusion into the kind of uniquely sovereign interests implicated in *Coeur d'Alene*. *See Hardin*, 223 F.3d at 1049 (permitting Tribal tax-relief action against State in light of *Coeur d'Alene*).

In summary, this Court should deny the petition because the result reached by the Court of Appeals was correct regardless of the route the court travelled.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE NO CONFLICT EXISTS BETWEEN THE DECISION OF A STATE COURT OF LAST RESORT AND THE COURT OF APPEALS' FINDING OF STANDING

The Revenue Secretary also contests the Court of Appeals' finding that the Tribes have standing to challenge the motor fuel tax. Citing the Montana Supreme Court decision in *Carter v. Montana Dept. of Revenue*, 274 Mont. 33, 905 P.2d 1102 (1995), the Revenue Secretary argues that the Tribes lack standing because the legal incidence of the tax falls on non-Indian distributors located off Indian lands, rather than on Tribes or their members. That fact does not dictate the standing analysis. The Court of Appeals properly found standing under this Court's precedents and the specific facts of this case.

First, if an Indian Tribe had no standing to challenge the taxation practices of a State, then *Chickasaw* and many of the other Indian tax cases cited above could not have been decided the way they were. Under *Chickasaw*, standing does not require that the legal incidence of the tax fall on the Tribe. As this Court explained, even if the legal incidence does *not* fall on the Tribe, the second prong of the *Chickasaw* test —

preemption analysis and balancing Tribal and State interests — must still be adjudicated. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 459. It can only be adjudicated if the Tribes have standing to do so. The Revenue Secretary overlooks this point as well as the very cases cited by *Chickasaw* and cited above in which the Tribes had standing to sue over taxes the legal incidence of which did not fall on the Tribe.

Second, even where the incidence of the tax falls on non-Indians, a Tribe *still* has standing to sue. Numerous Indian tax cases have involved claims by Tribes that State taxes invade legally-protected Tribal economic and sovereignty interests, even if the legal incidence of the taxes at issue have not fallen directly on the Tribes or their members. *See, e.g., Ramah Navajo School Bd., supra*; *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*; *Moe v. Confederated Salish and Kootenai Tribes, supra*; *White Mountain Apache Tribe v. Bracker, supra*. In none of these cases has this Court ever questioned the standing of a Tribe to vindicate its sovereign and/or economic rights, and there is no reason to do so in this case.

Third, there is no conflict between the Court of Appeals' ruling and the Montana *Carter* case. *Carter* is inapposite because the plaintiff there was an individual retailer, not an Indian Tribe. The interests of an individual retailer and the interests of a sovereign Tribe that uses revenue from gasoline sales to provide governmental benefits and services to its members differ greatly. In addition, the Revenue Secretary confuses standing with the merits. Her argument fails to note that it is the very question of legal incidence that must be litigated, and that settled *federal* law confirms the Tribes'

standing to litigate both this issue and the lawfulness of the tax even *if* the legal incidence of the tax falls on others.[2]

Moreover, the *Carter* court denied standing because the individual retailer could not show that she had been personally affected by the tax. Here, by contrast, the Tribes submitted uncontroverted affidavits supporting their allegations of injury. (*See* Petition at 12a). There is no conflict between *Carter* and the Court of Appeals ruling because the Circuit properly made the fact-specific inquiry to find standing according to this Court's precedents. There is no reason for this Court to review a decision that is fact-bound in this way.

Finally, a conventional standing analysis (as undertaken by the Court of Appeals) also confirms the Tribes' standing here. To invoke the jurisdiction of a federal court, a party must allege: (1) an actual or immediately threatened injury in fact, (2) a causal connection between that injury and the defendant's conduct such that the injury is fairly traceable to that conduct, and (3) that it is likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). An examination of the Tribes' Complaint quickly confirms that the Tribes met each of these requirements.

The Tribes alleged that the State of Kansas was precluded by the Act admitting Kansas into the Union, as well as by federal common law, from asserting its taxing or other jurisdiction on the Tribes' Indian lands; that the Tribes derived significant revenue from the operation of retail fuel businesses on their

2. Moreover, the Tribes of course had standing to litigate the applicability of the Kansas Act of Admission and the exemptions of the Kansas fuel tax statute for sales to "any other territory". (*See* Petition at 5a).

respective Indian lands with which they operate their Tribal governments and provide essential governmental services, employment and income to their members; that the Tribes and the State of Kansas had entered into tax compacts that precluded the State from imposing, *inter alia*, motor and special fuel taxes, on sales transactions occurring on the Tribes' respective Reservations; that despite the foregoing, relying upon certain amendments to Kansas statutes purportedly adopted in May, 1995, defendant attempted to enforce State laws requiring tax remittance and reporting for all motor and special fuels sold or delivered to or by the Tribes for retail sale on their Reservations; that as a result of defendant's conduct, the Tribes's fuel suppliers had demanded that the Tribes pay such taxes to the distributors for remittance to the State; that if such taxes were paid, the Tribes would face serious economic consequences; and that defendant's demand that Kansas fuel tax laws be applied to such sales was unlawful and/or *ultra vires* under both State and federal law.

As the Court of Appeals recognized, the actual or threatened injury to the Tribes was clear and immediate: The Tribes were being forced to bear at least part of the legal incidence of the obligation to remit the tax and to comply with reporting requirements, and at the very least the Tribes were being forced to bear a new economic burden that would reduce Tribal revenues, with economic and social consequences for the Tribes and their Reservation communities.

The causal connection between the threatened injury to the Tribes and defendant's conduct also was clear and immediate: The Revenue Secretary's decision that fuel sales to the Tribes were now to be taxed threatened to alter the years-long *status quo*. Finally, the likelihood that the Tribes' injury would be

redressed by a favorable decision was equally clear: Elimination of the tax on fuel sales to Tribal retailers — wherever the legal incidence might fall — would enable the Tribes to continue operating their retail fuel businesses and generating the Tribal taxes, jobs, and revenues which those businesses provide to the Tribes' respective governments and communities.

In sum, the Court of Appeals made the fact-specific inquiry and correctly ruled that in this case the Tribes had standing. Contrary to the suggestion by the Revenue Secretary, the Court of Appeals did not pronounce a "per se rule" that Tribes will always have standing when challenging State taxes. Each case depends on its particular facts. Based on the facts here, the Circuit found standing. This decision is not in conflict with *Carter* and presents no basis to grant the petition.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE COURT OF APPEALS DID NOT REACH THE *EX PARTE YOUNG* ISSUE AND BECAUSE NO DISPUTE EXISTS AS TO WHETHER THE *EX PARTE YOUNG* DOCTRINE APPLIES TO SUITS BY TRIBES CHALLENGING STATE TAXES

As noted above, the Revenue Secretary contends that this Court should address in the first instance whether Tribes may still challenge State taxing schemes under *Ex parte Young* in light of *Seminole* and *Coeur d'Alene*. The Tenth Circuit did not reach this issue and it is, therefore, not properly presented for review. As detailed above, the law is settled and there is no conflict in the circuits. *See, e.g.*, *Hardin*, 223 F.3d at 1041 (9th Cir. 2000) (also upholding district court jurisdiction over Tribal tax injunction suit against State officer). At a minimum,

this Court should let the Court of Appeals decide this issue in the first instance if such a determination is deemed necessary. *See Blatchford*, 501 U.S. at 788 (remanding undecided issue for appellate court's initial determination). This Court should deny the petition.

CONCLUSION

Based on the foregoing, this Court should deny the Revenue Secretary's request for a writ of certiorari to the Tenth Circuit Court of Appeals. There is no conflict with the precedents of this Court, no conflict in the circuits and no conflict with a State supreme court with respect to the ability of an Indian Tribe to sue a State to enjoin imposition of a State tax on Tribal governmental operations on Tribal lands. There is no reason to review this matter.

Respectfully submitted,

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